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IN THE

Supreme Court of the United States

October Term .....

No. 71 - 110

DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Sidney Parnas and David Gelbard, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming an order of the United States District Court for the Central District of California that they make answers to questions put to them before a Grand Jury to the United States or be committed for civil contempt.

Opinion Below.

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 8, 1971. A timely petition for rehearing was denied on June 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.[1]

1. Whether 18 U.S.C. §2518(9), which mandates disclosure of the fruits of wiretaps before the use of such fruits in any "hearing" or "proceeding", applies to a federal grand jury so as to require the government to make such disclosure to a witness subpoenaed before such a grand jury when the government intends to use the wiretap material in questioning the witness as the Third Circuit has held *en banc* in *In re Egan*, 39 U.S.L.W. 2724 (6-22-71); further, whether, following disclosure, the witness has the right to move under 18 U.S.C. §2518(10) to prevent such use, as the Court also held in *Egan*.

2. Whether if 18 U.S.C. §§2518(9) and (10) do not provide a grand jury witness the right to disclosure and to a hearing to determine the legality of the wiretap and to suppress its illegal fruits, the unambiguous protection offered by 18 U.S.C. §2515 to grand jury witnesses mandates an *Alderman* type hearing.

3. Whether, if §§2518(9) and (10) do not provide the witness with the right to disclosure and an opportunity to seek judicial resolution of the legality of the wiretap, the due process clause of the Fifth Amendment, the Fourth Amendment, article three of the Constitution, prior case law, and/or the supervisory power of this Court require that he be given such right and opportunity.

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[1]No question is presented concerning non-statutory illegal electronic surveillance, on the assumption that if any there was, the Solicitor General will disclose it.
Alderman v. United States, 394 U.S. 165 (1969).

Statutes Involved.

18 U.S.C. §2515.

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, and other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, lgislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. §2518(9).

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

18 U.S.C. §2518(10).

(10) (a) Any aggrieved person in any trial, hearing, oe proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision

thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the gounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Statement.

This case raises the most fundamental Fourth Amendment claims.

Sidney Parnas, a 63-year old accountant, works for Caesar's Palace, a legal, licensed Las Vegas casino. His principal duties are in connection with a travel service and information office at 1435 Broadway, New York, New York, which assists New Yorkers in making reservations for travel to and accommodations in Las Vegas.

Until recently, Mr. Parnas lived undisturbed by local or federal law enforcement agents. In November and December 1970, however, his voice was apparently overheard on a wiretap installed on the home telephone of Jerome Zarowitz, who, undisputedly, was the principal target of the government's massive electronic surveillance, and is a Palm Springs resident who was formerly an executive of Caesar's Palace. Following these intrusions, which were authorized by Hon. A. Andrew Hauk, U.S.D.J., under the provisions of the Omnibus Crime Control Act of 1968, 18 U.S.C. §§2516-19, the Federal Bureau of Investigation obtained a warrant to search Parnas.[2]

Then, early in 1971, Mr. Parnas received a subpoena to testify before a federal grand jury sitting in Los Angeles on February 10, 1971. This grand jury, which had returned indictments involving interstate gambling, was apparently, investigating "hidden interests" in Las Vegas casinos, "skimming" of funds from casinos, and related matters. Adrian Marshall, counsel

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[2]The record below has been certified and will be available to the Court.

for Mr. Parnas, asked attorneys for the United States whether they intended to use material obtained by wiretap in questioning Mr. Parnas before the grand jury. These attorneys replied that they had precisely that intention. Mr. Parnas appeared before the grand jury and read a statement declining to answer questions until his rights to disclosure of wiretap material and to make motions to prevent further intrusion on his right of privacy were respected.

Parnas remained insistent that his rights were being infringed, and the government remained obdurate that he must answer. He was taken before United States District Court Judge Crary to resolve the question. Believing the question to be too serious for immediate resolution, Judge Crary adjourned the appearance for one week to permit briefs to be filed. On February 17, 1971, Judge Crary denied relief and ordered Parnas to answer to be committed for civil contempt.

The facts regarding Mr. Gelbard are quite similar. A telephone tap under 18 U.S.C. §§2516-2518 was conducted of an unknown person, probably an alleged bookmaker. At the time of this tap and the authorization for the interception it is probably that Gelbard's name was unknown to the government and became known only because his conversations were also intercepted in the course of his conversing over the telephone with the person who was the object of the tap. Gelbard's attorney, Burton Marks, refused to permit Gelbard to be sworn before the grand jury.

Messers. Parnas and Gelbard seek to know whether the Omnibus Crime Control Act requires that governmental electronic surveillance be disclosed to its victims before it may be used against them, or whether, if not, the Constitution or compelling reasons of federal supervisory power require the same result. If disclosure is required, petitioners contend that they must be given the opportunity to obtain a prompt, but adequate, hearing on whether (as they claim) the wiretapping was illegal before their privacy may be further compromised by disclosure of its fruits through grand jury interrogation.

REASONS FOR GRANTING THE WRIT.

This case comes to the Court as the Justice Department shows every sign of using the grand jury—meeting in secret, interrogating witnesses without their counsel present, and ranging broadly over many fields of inquiry—as its principal weapon against alleged political criminals and, alleged racketeering. The rights of grand jury witnesses should be settled by this Court at the earliest opportunity, given the free-wheeling summary civil contempt power which district judges have—and are using—under the Organized Crime Control Act of 1970. The present case presents an issue of great importance in the administration of criminal justice, on which the courts of appeals are in disagreement, and, together with other cases here on issues of immunity and testimonial privilege presents an opportunity to bring order to this troublesome and controversial area. Petitioners turn to a consideration of the questions presented.

1. The Court of Appeals for the Ninth Circuit and the Third Circuit Have Disagreed as to Whether a Grand Jury Witness May Challenge the Use Against Him or Her of the Fruits of Illegal Electronic Surveillance, and Is Entitled to a Hearing on This Issue.

A. The Wiretap Law — Setting of This Case.

The Congress, in 1968, authorized wiretapping and electronic surveillance under judicial control for use in the detection and prosection of crimes listed in 18 U.S.C. §2516. The constitutionality of this legislation, 18 U.S.C. §§2516-18, is open to serious question, but is not at issue here. See, however, Schwartz, *The Legitimation of Electronic Eavesdropping*, 67 Mich. L. Rev. 455 (1969); *Lyon, Note, Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968*, 23 Rutgers L. Rev. 319 (1969); *Berger v. New York*, 388 U.S. 41 (1967). Briefly, the statutory scheme provides that application for surveliance orders may be made to a federal judge. The statute authorizes state judicial wiretap orders, but these provisions are irrelevant in this case, as provided in 18 U.S.C. §2518(1). The judge may require the application to be supplemented. 18 U.S.C. §2518(2). If he finds the statutory standards met, the judge may issue an eavesdropping order. §2518(3). The order must name the person whose communications are to be intercepted, must identify the communications facilities to be used, must identify the agency conducting the interception and the person authorizing the application, and must state the period of time for which the interception is

authorized. §2518(4). 18 U.S.C. §2518(5) limits orders under the statute to thirty days. Sec. 2518(6) permits the issuing judge to have reports submitted to him concerning the interception. Sec. 2518(7) authorizes "emergency" interceptions without prior judicial approval. Sec. 2518(8) deals with custody of recordings; it provides that the issuing judge must give notice of the interception to the person against whom the order was issued and may give such notice to all those overheard by the device. Secs. 2518(9) and (10) provide for the rights of those overheard in the course of electronic surveillance under the statute, to disclosure of the fruits of surveillance and to a hearing on legality and taint.

The statute, as the above summary reveals, seeks to insulate wiretapping and bugging from a holding of outright unconstitutionality, and to overcome the constitutional interdiction of *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). Its provision for judicial intercession seeks to satisfy the warrant requirement of the Fourth Amendment; the provisions for limitation of the tap or bug seek to limit the scope of wiretap searches, so that they do not become forbidden "general" or ransack searches. See *Katz, supra; Stanford v. Texas*, 379 U.S. 476 (1965). These protective provisions are not "window-dressing" or sham—they are the essence of the statute, the difference (or so the draftsmen apparently thought) between a constitutional and an unconstitutional wiretap bill. They should, therefore, be given an expansive and not a narrow reading.

So it is, petitioners submit, that §2518(9) and (10) should be read as the Third Circuit read them, and not as did the Ninth Circuit.

B. Analysis of Sections 2518(9) and (10).

The government has admitted that its questioning of petitioner will result in "disclosure" of intercepted communications. Thus, it appears that they are entitled to ten days' notice of the interception, within which time they could move to prevent the disclosure under §2518 (10). The Court of Appeals, however, affirmed that a grand jury was not a "trial, hearing or other proceeding in a Federal . . . court," and that §2518 does not require notice and disclosure.

This is in direct contradiction to the holding of the Court of Appeals for the Third Circuit, sitting *en banc*, in *In re Egan*, 39 U.S.L.W. 2724 (May 28, 1971). There, the Court found that §2518(10)(a) provides relief for any person who is an "aggrieved person" within the meaning of §2510(11) in "any . . . hearing or proceeding . . . before any . . . authority of the United States", 39 U.S.L.W. 2725, and the Court specifically found that a witness before a grand jury is thus protected under §251[illegible] This case is the only other Court of Appeals' decision on this point.

"Proceedings in court" encompasses many ancillary proceedings. See cases collected in *34 Words and Phrases*, pp. 190-91 (heading "Proceeding in Court") (Perm. ed.) and 1970 Pocket Part pp. 25-26.

The statute contains internal evidence that the word "proceeding" includes a grand jury proceeding. Sec. 2517(3) in authorizing disclosure of intercepted communications, speaks of "any *criminal* proceeding" and

of "any . . . *grand jury* proceeding" (emphasis added). And §2515 encompasses "any . . . other proceeding in or before any . . . grant jury." Given the principle that the same word should have the same meaning throughout the statute, it is clear that "proceeding" in §2518 (9), used without qualification, encompasses "criminal proceeding", and "grand jury proceeding", and has as well a reach which need not be specified in order to decide this case. See generally Thorne, *Construction of Statute*, in How to Find the Law, p. 353 (1949). Furthermore, Rule 1 of the Federal Rules of Criminal Procedure defines "criminal proceeding" as inclusive of grand juries. See F.R. Crim. P. 6. Under this reading, while petitioners would not have a *right* to disclosure of the fact of interception under §2518 (8)(d),[a] they acquire this right when the government seeks to use the information to their detriment—a thoroughly logical reading of the statute. See also Point 3, *infra*.

Since petitioners are "aggrieved persons" within the meaning of §2518(10), Rule 41(e), F. R. Crim. P. they would have the right to move in the district court to prevent further invasion of their privacy through use against themselves of the tainted evidence under *Alderman v. United States*, 394 U.S. 165 (1969).

The government, and the court below, apparently rely upon the legislative history of the statute to contradict this reading of its plain language. This novel approach seems to permit reading the statute itself only if the legislative history is vague, is as logically unserviceable as it is legally impermissible. See *Thorne, supra*, at 359.

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[a]Except insofar as the F. R. Cr. P. 41 inventory provisions give him such a right.

The government cited in the court below the following language from S. Rep. No. 1097, 90th Cong., 2d Sess. pp. 105-06, 2 U.S. Code Cong. & Adm. News 2195 (1968):

> " 'Proceeding' is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing."
>
> * * *
>
> "Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. . . . There is no intent to change this general rule."

The report cites *United States v. Blue*, 384 U.S. 251 (1966), as an indication of what the "general rule" is. *Blue* is cold comfort to the government.

In that case, the taxpayer had filed pleadings in a civil case prior to his criminal indictment. The Court held that if these pleadings constituted compelled self-incrimination, their allegedly-tainted character could be tested by a motion to suppress their use as evidence. The Court said that the use of tainted evidence before a grand jury does not invalidate an indictment. 384 U.S. at 255 n. 3.

Petitioners do not seek to quash or prevent an indictment—all they want is the right to preserve this privacy from further intrusion. Their situation and that of the petitioner in *Blue* bear no relation to one another.

We may assume for purposes of this case that *Blue* is still the law. Petitioners are still entitled to relief.[4]

The legislative history thus misreads the holding in *Blue*. More than this, it fails to take account of the extensive body of case law which permits a grand jury witness judicial review of the propriety of questions put to him, and which imposes limitations upon the conduct of government counsel before grand juries. The following discussion sets out this case law, and makes clear that reliance upon the legislative history is wrong for two reasons: First, to the extent that the legislators evince an overriding intention to codify existing law, that law supports the petitioners' position here. To the extent that the legislators misstate existing law, their legal analysis is not worthy of credence by this Court which is, after all, charged under Article Three with exercising the judicial power and not leaving it to Congress to do so.

The person who claims to be victim of an unlawful search is *always* entitled to obtain disclosure of the extent of the search and a judicial determination of its legality, just as soon as he has grounds to believe that he has been searched. Whether this proceeding is styled a "pre-indictment motion to suppress" or an independent lawsuit in equity, the power of a federal district court is undoubted. See *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 355 (1931); *Austin v. United States*, 297 F. 2d 356 (4th Cir. 1961); *Stern v. Robinson*, 262 F. Supp. 13, 15 (N.D. Tenn. 1966). See also *Perlman v. United States*, 247 U.S. 7 (1918). In the average case, the aggrieved person

[4]Compare *United States v. Arcuri*, 282 F. Supp. 347 (E.D. N.Y.), aff'd, 405 F. 2d 691 (2d. Cir. 1968).

knows the search has been conducted, because tangible objects have been taken after a visible and announced intrusion. The victim of wiretapping, however, rarely enjoys such notice, and §2518(9) merely puts him on a par with the victims of other searches. The right to suppression of evidence, and prevention of its use, exists unrelated to the question whether, as the legislative history would have it, any "person" is a "party to a grand jury proceeding". See Point 3, *infra*. This right to prevent the use of unconstitutionally-obtained evidence is merely a corollary to the right of privacy itself, which the Fourth Amendment, among others, protects. See *Austin v. United States, supra.*

With specific reference, however, to grant jury proceedings, witnesses can and often do litigate the propriety of compelling their testimony concerning certain subjects. Much of this litigation deals with the invocation of evidentiary privileges, designed to protect private communications. The doctor-patient, clergyman-penitent, husband-wife, and psychotherapist-patient privileges are among those which the law recognizes and which a witness may interpose. Basically, the witness in such a position seeks to defend his right of privacy, or the right of privacy of someone in a confidential relationship with him, against governmental intrusion. Closer to our case, a district judge for the Northern District of California has restrained governmental intrusion into private communications to a newspaper reporter, relying heavily upon the First Amendment guarantee of freedom of the press and the rights

of privacy which must necessarily attend such a guarantee. *In re Caldwell*, 311 F. Supp. 358 (N.D. Calif. 1970), 39 U.S.L.W. 2281 (9th Cir. 1970), *cert. granted*, O. T. 1970, No. 1114 (May 4, 1971).[5]

The Fifth and Sixth Amendment guarantees of freedom from compulsory self-incrimination and right to counsel have been enforced on behalf of a grand jury witness. *Sheridan v. Garrison*, 273 F. Supp. 673 (E.D. La. 1967); *Chandler v. Garrison*, 286 F. Supp. 191 (E.D.La. 1968). See also *In re Grand Jury Subpoenas*, 225 F. Supp. 923 (N.D. Ill. 1964) (taking jurisdiction of motion to quash but denying relief).

Thus, far from being unusual that a witness should seek to challenge the propriety of his subpoena, and of the governmental conduct which will flow from it, the case-law demonstrates that those in petitioners' position have customarily been permitted to do just that. See *In re Egan, supra.*

There are, of course, strong reasons of policy and prudence for construing the statute as it literally reads. Petitioners are the typical, rather than the atypical, victim of 1968 Crime Bill surveillance. *Their* telephones were not tapped. No agent of the Federal Bureau of Investigation ever made a showing of probable cause to invade *their* privacy. They are the accidental victims of a search begun against others. No judicial officer has ever given petitioners' privacy a moment's

[5]A witness subpoenaed before a Congressional Committee can bring an anticipatory challenge to the committee and to its right to invade his right of privacy. *Stamler v. Willis*, 371 F. 2d 413 (7th Cir. 1966).

reflection until the applications which give rise to the appeal. Before the invasion of privacy goes further, through disclosure of that which was overhead, Petitioners should be given some few minutes of judicial time. Once the disclosure is made, there is no real redress. A bell cannot be "un-rung". Privacy once compromised, cannot be restored. *In re Egan, supra,* the "pretrial" motion prospect not only does not provide complete redress: If petitioners are never indicted, it provides no opportunity at all to challenge governmental illegality.

More than prudence, however, counsels the reading of the statute which petitioners urge. As argued below, the constitution may well require that a victim of electronic surveillance be given a change to litigate the legality of the search before its fruits are used against him. Whether the Court concurs in that argument or not, clearly the constitutional argument has merit. More than once this Court has construed legislation so as to avoid constitutional doubts, *e.g., United States v. Rumely,* 345 U.S. 41, 47 (1948); *United States v. Seeger,* 380 U.S. 165, 188 (1965) (Douglas, J., concurring), or in harmony with constitutional policy, *e.g., United States v. Johnson,* 323 U.S. 273, 274-76 (1944) (Frankfurter, J., for the Court).

C. Concluding Observations on Section 2518.

The witness before a grand jury is an anomaly in our law. Without his counsel, in secret, and subject to searching and hostile inquistion at the hands of a trained interrogator, he must do the best he can, with

a little help from a lawyer in the anteroom, to defend his rights. That he should be deprived of judicial review of proposed violations of his statutory and constitutional rights in the interrogation process is a novel and iniquitous notion. To permit this violation in the face of plain statutory language which inderdicts is unheard of.

2. 18 U.S.C. §2515 Requires That a Hearing Be Held to Determine Whether the Information Upon Which the Grand Jury Questions the Witness Was Derived From Unconstitutional Electronic Surveillance.

Section 2515 provides in part:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in or before any . . . grand jury . . . if the disclosure of that information would be in violation of this chapter."

The meaning of this section is so clear that any lengthy embellishments would only serve to obfuscate it; it unequivocally prohibits the use of evidentiary fruits of illegal electronic surveillance before a grand jury. A simple syllogistic reading of this language, therefore, mandates an *Alderman*-type hearing before a District Court judge to determine under §2518(10)(a) whether the electronic surveillance was, in fact, constitutional.

This reasoning is the keystone in the Court's opinion in *In re Egan, supra,* where a remand to the District Court for such a hearing was ordered.

3. The Fourth and Fifth Amendments. This Court's Supervisory Power Over Criminal Justice and Prior Case Law Require Disclosure of Overheard Conversations to a Grand Jury Witness. In the Alternative, Disclosure Must Be Made to a Grand Jury Witness Who Gives Notice of a Good Faith, Non-Frivolous Ground of Objection to the Use Against Him of the Tainted Evidence.

Although the wiretap which is at issue here was not designed to overhear petitioners, the Federal Bureau of Investigation has claimed, for example, that Parnas was overheard in conversations with Zarowitz which establish probable cause to believe that these two and others are involved in interstate gambling in violation of 18 U.S.C. §1952, in "skimming" funds from Ceasar's Palace (a Las Vegas casino) into the underworld in apparent possible violation of various income tax and anti-racketeering laws, and in the operation of Caesar's Palace as an interstate business in violation of Nevada and federal law. The FBI's exuberant allegations, made in an affidavit to get a search warrant, give petitioners reason to believe that they are not being asked before the grand jury merely to help ensnare others.

Under these circumstances, they are entitled, like any other persons aggrieved by an assertedly illegal search, to move to suppress the fruits of that search and have them returned to him. See cases cited in Part I, *supra*, including *Go-Bart Importing Co. v. United States, supra; Austin v. United States, supra.* This would be theirs whether or not they were subpoenaed witnesses.

The government apparently does not dispute that petitioners are entitled to *some* judicial review of the allegedly illegal interception of their conversations, and that they could move under F.R. Crim. P. 41(e), by

independent suit in equity, or by an action under 18 U.S.C. §2520. The statutory remedies of suppression under §2518(10) and suit for damages under §2520 are not exclusive, so as to preclude other lawsuits under the more general federal question jurisdictional provisions such as 28 U.S.C. §§1331, 1343, and 1361.[6]

The government could not well dispute petitioners' rights to full judicial redress of claimed violations of constitutional right, or claim that §2518 limits judicial review. When the Congress wishes to limit the availability of review, it does so in terms insusceptible of misunderstanding. See, *e.g.*, 50 U.S.C. App. 460(b)(3). And even then, this Court has interpreted such provisions so as to preserve as much as the statutory language will permit of the general federal judicial power to inquire into claimed violations of federal right. See, *e.g.*, *Oestereich v. Selective Service System*, 393 U.S. 233 (1968); *Breen v. Selective Service Board*, 396 U.S. 460 (1970). Serious constitutional questions are involved in any restriction on judicial review of constitutional violations. See, *e.g.*, *Blount v. Rizzi*, 39 U.S.L.W. 4120 (1971).

The importance of judicial intervention into wiretap matters was underscored by this Court in *Alderman v. United States*, 394 U.S. 165 (1969), in which the Court also dealt with the right of the victim of surveillance to notice that he has been surveilled. And while *Alderman* gives the *logs* of surveillance only to the victim of unlawful interception, notice of the *fact* of interception and a judicial determination of legality

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[6]A court has extensive ancillary jurisdiction even in criminal matters. *Morrow v. District of Columbia*, 417 F. 2d 628 (D.C. Cir. 1969).

are clearly envisioned not only in *Alderman* but in *Giordano v. United States*, 394 U.S. 310 (1969) and *Taglianetti v. United States*, 394 U.S. 316 (1969). *Alderman*, *Giordano* and *Taglianetti* immeasurably strengthen petitioners' position.

The government's contention is not, therefore, that Parnas and Gelbard are not entitled to review; rather, that they are not entitled to *notice* of the invasion of privacy, and not entitled to litigate the legality of the invasion prior to having, under penalty of jail, to answer questions fashioned from the materials obtained in the invasion. This contention overlooks the basic principle that the due process clause guarantees a hearing that is not only procedurally fair but timely:

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' [Citation omitted.] The hearing must be 'at a meaningful time and in a meaningful manner.' [Citation omitted.] In the present context these principles require that a recipent have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Goldberg v. Kelly*, 397 U.S. 254, 39 U.S.L.W. 4223, 4226 (1970).

Goldberg deals with the right of a welfare recipient to a pre-termination hearing concerning her or his welfare benefits—a grant of governmental largesse which however necessary to survival has never been regarded as a constitutional right. Here we deal with a constitutional right of first importance—the right of privacy of confidential communications, protected by the first, fourth, fifth, and perhaps the ninth, amendments. See

Griswold v. Connecticut, 381 U.S. 479 (1965); *Frank v. Maryland*, 359 U.S. 360 (1959); *Marcus v. Search Warrant*, 367 U.S. 717 (1961). The timeliness of a hearing is as important an issue here as in *Goldberg*. Indeed, since we deal with a constitutional right of the first magnitude, there is strong authority that the intercession must not only be timely but must be in a judicial proceeding. See *Blount v. Rizzi*, 39 U.S.L.W. 4120 (1971), and particularly the citation with approval in fn. 5 of the Court's opinion of *Manual Enterprises v. Day*, 370 U.S. 478, 518-19 (1962) (concurring opinion of Brennan, J.).

More than interests in privacy and speech are at stake here. If petitioners do not answer questions put to them before the grand jury, they will go to jail. The government and the court below would send them there without any judicial inquiry whatever into the legality of the government's conduct in calling them as a witness and asking them questions fashioned from the intrusion into their privacy. This is not a case like *Blue*, in which complete relief could be granted a civil plaintiff in a pending criminal action. Petitioners' liberty is in jeopardy. As Learned Hand observed:

> "Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens." *United States v. Coplon*, 185 F. 2d 629, 638 (2d Cir. 1950).

This case raises, because of the imminent threat of jail, questions deeper than *Goldberg v. Kelly*. Neither the Congress nor the federal courts may fashion a rule which deprives a citizen of all opportunity for judicial review before committing him to jail. See generally Hart

& Wechsler, *The Federal Courts and the Federal System*, 312-340, and particularly p. 340:

> "Jurisdiction always is jurisdiction only to decide constitutionally."

The meaning of this cryptic phrase from two eminent scholars in the field of judicial review is starkly clear in this case: The district judge cannot exercise jurisdiction to commit Sidney Parnas and David Gelbard to jail and at the same moment cut off their right to litigate questions of constitutional right on which the commitment inescapably depends. The cases and authorities cited by Hart and Wechsler establish this proposition. See also Tigar, *Judicial Review, the "Political Question Doctrine, and Foreign Relations*, 17 U.C.L.A. L. Rev. 1135, 1173-79 (1970).

The importance of judicial review is the more evident because, as noted above, petitioners have never had a judicial determination that their privacy should be invaded by a telephone tap. Such a determination was made only with respect to Zarowitz.

Too, we do not deal here with tangible property which can be given back or its equivalent given in damages. Privacy once gone cannot be recaptured, and complete relief requires a hearing and notice of the type petitioners have urged.

In the alternative, a narrower holding may give all the relief they seek. Parnas and Gelbard are no ordinary grand jury witnesses. They are evident targets of a criminal investigation, armed with the knowledge that they have been overheard on a wiretap far surpassing in breadth the narrow little eavesdrop in *Katz v. United States, supra*, making a good-faith, non-frivolous attack on the legality of that wiretap, and about to go to jail for refusal to answer. Thus, a holding which said

that one in such a position might litigate prior to his grand jury appearance would present little, if any, difficulty for the government. Requirements of "good faith" and "nonfrivolous" contentions abound in the law. *E.g.*, 28 U.S.C. 1826(b). Giving special consideration to a witness-target is also not novel. See, *e.g.*, *United States v. DiGrazio*, 213 F. Supp. 232 (N.D. Ill. 1963); *Jones and Short, v. United States*, 342 F. 2d 863 (D.C. Cir. 1964); *Sheridan v. Garrison, supra; Chandler v. Garrison, supra.*

Of course, there is little if any inconvenience to the government posed by a requirement that all witnesses be given the notice and hearing which petitioners request. The issue will generally not be whether the government's evidence is tainted, but whether its conduct was legal. This determination can be made based on the application for the wiretap order and a minimum of oral testimony concerning it. Thus, there is no occasion for litigious interruption of the grand jury process, a consideration which the court may well consider in fashioning an appropriate judicial response to this problem. See concurring opinions of Harlan, J., in *Oestereich v. Selective Service System*, 393 U.S. 233 (1968); *Breen v. Selective Service Board*, 396 U.S. 460 (1970). See also *National Students Ass'n v. Hershey*, 412 F. 2d 1103 (D.C. Cir. 1969).

Conclusion.

For the foregoing reasons, the writ should issue.

Respectfully submitted,

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APPENDIX.

Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. David Gelbard, Defendant-Appellant. No. 71-1263.

United States of America, Plaintiff-Appellee, v. Sidney Parnas, Defendant-Appellant. No. 71-1264.

Filed: June 8, 1971.

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH, CARTER and TRASK, Circuit Judges.

PER CURIAM.

These consolidated appeals involve persons who proved recalcitrant when they appeared as witnesses before a federal grand jury and who were each committed to custody pursuant to 28 U.S.C. § 1826(a), after being adjudged guilty of civil contempt. In order to meet the rigorous statutory time limit imposed by 28 U.S.C. § 1826(b) it was necessary to, and this court did, immediately following oral argument, render decision. We affirmed the judgment of the court below and stated an opinion would follow. This is that opinion.

Both Gelbard, the appellant in No. 71-1263, and Parnas, the appellant in No. 71-1264, refused to answer any questions based upon information gained by the government from wiretapping authorized by the district court pursuant to 18 U.S.C. § 2518, which is a part of Title III of the Omnibus Criminal Control Act

and Safe Streets Act of 1968, Pub. L. 90-351, June 19, 1968, 82 Stat. 218. When cited for contempt in the district court, each attacked the constitutional validity of Section 2518, and additionally urged that he should not be required to testify until and unless first allowed to inspect all applications, orders, tapes and transcripts relating to such electronic surveillance and afforded an opportunity to suppress the use before the grand jury of any evidence so secured. The court rejected their contentions and held the statute valid.

We find it unnecessary to consider the district court's finding that Section 2518 is constitutionally valid. A witness before a grand jury lacks standing to challenge a statute on constitutional grounds unless the statute directly bears upon his privilege against self-incrimination. *Carter v. United States,* 417 F.2d 384, 386-7 (9th Cir. 1969), *cert. denied,* 399 U.S. 935 (1970). Section 2518 is not in that category.

It appears to be settled that a witness in a grand jury proceeding has no right to resort to a court to secure authoritative advance determination concerning evidentiary matters that arise, or may arise, or to exclude evidence to be used in such a proceeding. See *Cobbledick v. United States,* 309 U.S. 323 (1940); *Costello v. United States,* 350 U.S. 359 (1956) and *Lawn v. United States,* 355 U.S. 339 (1958). Finally, we agree with the Fifth Circuit's decision in *Dudley v. United States,* 427 F.2d 1140, 1141 (5th Cir. 1970) "that nothing in the Omnibus Act, particularly § 2518(10)(a) created a statutory exception which would

permit a pre-indictment motion to suppress evidence that might be presented to the grand jury. . . . The legislative history of the Act supports this conclusion. See Senate Report No. 1097, 90th Cong. 2d Sess. (1968) at p. 2195."[1]

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[1]The report contains this statement:

"Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (Blue v. United States, 384 U.S. 251 (1965)). There is no intent to change the general rule."

Neither does 18 U.S.C. § 2518(9) support appellants in their contention that as witnesses they were entitled to copies of the applications and orders for the interceptions, together with transcripts, tapes, etc.

The language of paragraph (9) does not so indicate and the Legislative Report shows that paragraph (9) must be read in pari materia with paragraph (10). Thus, paragraph (9) is intended to enable a party charged with a criminal offense or facing other adversary proceeding to secure copies of the application for and the order permitting the interception to enable him to move to suppress evidence so gathered; but it does not extend to grand jury proceedings. As the Report states: " 'Proceeding' is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing." Id. p. 2195.